LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 6 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] ///

SAM ACCARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME LEWIS
Attorney for Petitioner
66 Court Street
Brooklyn, New York

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	11
Conclusion	31
Appendix A—Opinion of the Court Below	A1
Appendix B—Judgment Sought to be Reviewed	A11
Appendix C—Statutes Involved	A13

Authorities Cited

Cases

American Fur Co. v. United States, 2 Pet. (27 U.S.) 358	20, 21
Bishop v. United States, 107 F. 2d 297 (App. D.C. 1940)	29
Block-Burger v. United States, 284 U.S. 299	22
Cain v. United States, 19 F. 2d 472 (C.C.A. 8 1927)	24
Carr v. State, 37 N.W. 630 (S. Ct. Neb. 1888)	28
Cliquot's Champagne, 3 Wall. (70 U.S.) 114	21
Delli Paoli v. United States, 352 U.S. 232	18, 19

PAGE

Egan v. United States, 287 Fed. 958 (App. D.C. 1923) 29
Eori v. Aderhold, 53 F. 2d 840 (C.C.A. 5 1931) 24
Escobedo v. Illinois, 378 U.S. 478 ..... 12, 13

Goldsmith v. United States, 42 F. 2d 133 (C.C.A. 2 1930) 20, 21
Gore v. United States, 357 U.S. 387 22

Holland v. United States, 348 U.S. 121 .....29, 30, 31
Hooper v. United States, 216 F. 2d 684 (C.A. 10 1955) 30
Hopt v. People of Utah, 120 U.S. 430 28

Krulewitch v. United States, 336 U.S. 440 ..... 16, 19

Lilenthal's Tobacco v. United States, 97 U.S. 237 ... 27
Lutwak v. United States, 344 U.S. 604 ..... 18, 19

Massiah v. United States, 377 U.S. 201 ..... 12, 13

People v. Dorado, 40 Cal. Rptr. 264, 394 P. 2d 952
Pereira v. United States, 347 U.S. 1 22
Pettine v. Territory of New Mexico, 201 Fed. 489 (S. Ct. 1964) 12
Pinkerton v. United States, 328 U.S. 640 22
(C.C.A. 8 1912) 28

Shepard v. United States, 236 Fed. 73 (C.C.A. 9 1916) 28
Sherman v. United States, 356 U.S. 369 17

United States v. Belisle, 107 F. Supp. 283 (W.D. Wash. 1952) 29
United States v. Brunet, 53 F. 2d 219 (W.D. Mo. 1931) 29
United States v. Campisi, 248 F. 2d 102 (C.A. 2 1957), cert. denied 355 U.S. 892 .....18, 19, 20
United States v. Foster, 9 F.R.D. 367 (S.D.N.Y. 1949) 29
United States v. Gooding, 12 Wheat. (25 U.S.) 460 .. 20
United States v. Guerra, 334 F. 2d 138 (C.A. 2 1964) 12
United States v. Haupt, 47 F. Supp. 836 (N.D. Ill. 1942), reversed on other grounds 136 F. 2d 661 .. 29
United States v. Heath, 9 Mackey 272, 20 D.C. 272 (Dist. Col. Sup. Ct. 1891) 28

PAGE

United States v. Hughes, 34 Fed. 732 (N.D. Tex. 1888) 28
United States v. Jackson, 29 Fed. 503 (C.C.S.D. Ga. 1886) 28
United States v. Jones, 31 Fed. 718 (C.C.S.D. Ga. 1887) 28
United States v. Krulewitch, 145 F. 2d 76 (C.C.A. 2 1944) 19
United States v. Krulewitch, 167 F. 2d 943 (C.C.A. 2 1948), reversed 336 U.S. 440 19
United States v. McHugh, 253 Fed. 224 (W.D. Wash. 1917) 28
United States v. Meagher, 37 Fed. 875 (C.C.W.D. Tex. 1888) 28
United States v. Miller, 246 F. 2d 486 (C.A. 2 1957) 21
United States v. Olweiss, 138 F. 2d 798 (C.C.A. 2 1944), cert. denied 321 U.S. 744 21
United States v. Perillo, 164 F. 2d 645 (C.C.A. 2 1947) 21
United States v. Schneiderman, 106 F. Supp. 906 (S.D. Cal. 1952) 29
United States v. Sorrentino, 78 F. Supp. 425 (M.D. Pa. 1948) 21
United States v. Wright, 16 Fed. 112 (C.C.E.D. La. 1883) 27

Walder v. United States, 347 U.S. 62 13
Wolcher v. United States, 233 F. 2d 748 (9 Cir.) 19

Statutes

18 U.S.C. §371 3
21 U.S.C. §§173, 174 .....3, 5, 23
26 U.S.C. §§4701, 4703, 4704(a), 4771(a)(1) and 7237 3, 5
26 U.S.C. §§4702(a), 4721, 4722, 4724(c), 7237(a) .. 5
28 U.S.C. §1254(1) 1

PAGE

United States Constitution

Fifth Amendment 3
Sixth Amendment 3

Miscellaneous

Jury Instructions and Forms For Federal Criminal Cases, Hon. William C. Mathes, 27 F.R.D. 39 25

IN THE

Supreme Court of the United States

October Term, 1964

SAM ACCARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sam Accardi, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on March 10, 1965.

Opinion Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra,* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on March 10, 1965 (Appendix, *infra*). Mr. Justice Harlan has, by order extended the time for filing this petition for certiorari to and including May 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Was Petitioner Accardi denied his constitutional right of counsel and due process of law by the testimony of a narcotics agent of alleged inculpating statements by Accardi made after Accardi had been arrested and indicted and in the absence of his counsel?

2. Was Accardi illegally convicted on the basis of charges and proof of an alleged scheme to import heroin which was outside the purview of the indictment? Aside from prejudicial variance, did this also work a denial of due process of law, i.e., denial of adequate notice of the charge for which the defendant was to be tried?

3. Did the "agency-hearsay" theory which was used in this case result in rendering the substantive and conspiracy counts indistinguishable from and equivalent to each other, so as to result in double or multiple charges and punishment for a single offense?

4. Were the charges and the consecutive sentences, viewing the case as a whole, in violation of the constitutional prohibitions against double or multiple punishment for a single offense?

5. Where narcotic agents have closed their investigative net over the alleged members of an alleged conspiracy, can anything thereafter done or said by the alleged conspirators be said to be in furtherance of the conspiracy?

6. Were the instructions to the Jury on reasonable doubt erroneous because of reference to a doubt which would cause a person to *hesitate* to act in the important affairs

of his own life, instead of speaking of that kind of sure-minded freedom from doubt which would cause a person to take affirmative action, and was petitioner Accardi thereby denied a fair trial?

Constitutional Provisions and Statutes Involved

The case involves 18 U.S.C. § 371, the general conspiracy provision; several Narcotics provisions, namely, 21 U.S.C. §§ 173, 174, and 26 U.S.C. §§ 4701, 4703, 4704(a), 4771(a)(1) and 7237. It also involves the Fifth Amendment protections as to due process of law and double or multiple punishment, and the Sixth Amendment right of counsel. The statutes above mentioned are quoted in the Appendix hereto, *infra*.

Statement of the Case*

Petitioner Accardi was convicted, after a jury trial in the United States District Court for the Southern District of New York (Cannella, D.J.), on three substantive counts and one conspiracy count of narcotics violations (78a). The United States Court of Appeals for the Second Circuit affirmed the conviction (Appendix hereto, *infra*).

Accardi was sentenced to a total of fifteen years under three consecutive five-year sentences, *viz.*, five years each

---

* " a" refers to the printed "Appellant's Appendix" in the Court below, nine extra copies of which are filed herewith. "G a" refers to the printed "Appendix for United States of America" in the Court below, of which nine extra copies are also filed herewith. Citations to non-printed portions of the Record on Appeal in the Court below—all such citations herein being to the typewritten stenographic minutes of the trial—appear herein as "Tr. ". The copy of those stenographic minutes which was docketed in the Court of Appeals is filed herewith.

under two of the substantive counts and the conspiracy count; in addition, fines totalling $16,000 were imposed; still another five-year sentence was imposed under another of the substantive counts, but execution of this latter sentence was suspended and the defendant was placed on probation for one day thereunder (78a-79a). Further details as to these sentences and as to the counts to which each of them pertains are recited infra. The unusual severity of these consecutive sentences is believed by us to affect the issues of this certiorari application. Accardi, a man 62 years of age and a first offender in the narcotics area, has been condemned to this virtual life-time sentence for what in realistic effect consists literally of a single alleged narcotics sale to Government agents who, to a degree and in a manner unusual even in the characteristically provocateurist techniques of contemporary Federal narcotics law enforcement, were instigational and *particeps criminis* in the alleged criminal activity—the case being also one where the defendant took the stand in his own defense and stoutly proclaimed his entire innocence and that the charges against him were an out-and-out frameup by over-zealous personnel of the Federal Narcotics Bureau. It was a principal theme in our appeal in the Court below and we likewise urged here that in such a case, where an elderly defendant has been subjected to the unusual harshness of consecutive sentences dooming him to practically sure life-time imprisonment, the appellate tribunals should scrutinize the record "with eagles' eyes" for prejudicial error and injustice.

Accardi's trial and conviction took place in 1964 (sentence imposed August 24, 1964—78a). The indictment had been filed August 15, 1955 (1a). The reason for the delay of nearly nine years in the trial was that, on the eve of the

trial in September 1955 Accardi became a fugitive,* being returned to the United States from Italy on a presidential warrant in November 1963 (3a, 4a; Tr. 375, 380-382, 392-405, 413-414, 540-541).

Two other defendants, Joseph Russo and Frank DiGregorio, were indicted together with Accardi (8a). Russo and DiGregorio pleaded guilty in 1955 (2a) and were each sentenced to four years (2a-3a). The five count indictment** actually involved just two alleged sales of heroin, one on or about January 31, 1955 (8a), the other on or about February 18, 1955. The first count (8a) was a substantive "sale" count based on the alleged sale of January 31, 1955 (21 U.S.C. §§ 173 and 174). The second count (9a) was a "tax" or "stamped package" count involving the same alleged sale of January 31, 1955 (26 U.S.C. §§ 4704(a), 4701, 4703, 4771(a) and 7237(a)). The third count (9a) was a "sale" count based on the alleged sale of February 18, 1955 (21 U.S.C. §§ 173 and 174). The fourth count, as mentioned (see last preceding footnote), was dismissed. The fifth count charged a conspiracy extending from January 1,

---

* He claimed at the trial that his flight was motivated by physical terrorization at the hands of the arresting agents and by despair that as a frameup victim he stood no chance of a fair trial to establish his innocence; he surely paid a heavy price for his flight, forfeiting $75,000 bail and separating himself from his very close-knit family of a wife and three sons (*infra*). We are thus preliminarily emphasizing the colorable believability of Accardi's explanation of his motive for fleeing, because we contend that genuine factual issues were presented for jury consideration in Accardi's trial and that he was denied any chance of jury fairness by erroneous instructions to the Jury and by wrongful admission of evidence.

** The Fourth Count (10a), a "registration" and "tax" count (26 U.S.C. §§ 4702(a), 4721, 4722, 4724(c) and 7237(a)) in regard to an alleged narcotics sale of February 18, 1955, was dismissed on the Government's motion in Accardi's trial (6a).

1955 to the date of the indictment (August 15, 1955) but specifying only matters related to the period between the dates involved in the two alleged sales under the substantive counts, i.e., the period between January 31 and February 18, 1955 (10a-13a).*

The Government's case against Accardi at the trial depended decisively on the testimony of Zirilli, a former Narcotics Agent (G2a-39a; Tr. 5-73). In essence, Zirilli's testimony was that on January 31, 1955 he bought one-half kilogram of heroin from DiGregorio and Russo for $5,000 (Accardi not having appeared in the picture in any way); that in subsequent conversations during the first half of February 1955 with DiGregorio and Russo the identity of the latters' heroin supplier began to emerge under the name of "Big Sam"; that Zirilli maneuvered the situation to bring himself into personal contact with this "Sam"; that on February 16, 1955 Zirilli achieved this strategy and met with the within petitioner Sam Accardi who spoke in words indicating that he had supplied the January 31 heroin and wanted Zirilli to buy more; that on the next day (February 17) Zirilli arranged with DiGregorio for a second purchase of a kilogram of heroin for $9,600 which was consummated on the following day (February 18) under circumstances which the Government claimed indicated that Accardi was involved—i.e., Accardi was seen travelling to and present at the scene of a get-together of Accardi, Di Gregorio and Russo shortly after which Di Gregorio delivered heroin to Zirilli; that later in February 1955 Zirilli

---

* One question in this certiorari application is whether evidence of certain alleged happenings subsequent to February 18, 1955 (the date of the second and last of the alleged narcotics sales herein) was properly admitted under the conspiracy count (details *infra*).

initiated through DiGregorio a proposition for Zirilli and Accardi to import heroin from Italy; and that after Zirilli in late April 1955 discussed with Accardi personally this Italian project it fell through in early May 1955 when DiGregorio told Zirilli that Accardi had received from Italy a rejection of Zirilli's proposition.

The only testimony other than that of Zirilli which purported to place Accardi anywhere in the picture of the narcotic transactions of Zirilli with DiGregorio and Russo was surveillance testimony by other narcotic agents; none of this testimony, however, went beyond saying that Accardi was seen at times and places in the company of Zirilli as stated by the latter, or was seen in the company of DiGregorio and Russo shortly before DiGregorio delivered heroin to Zirilli on February 18, 1955 (Tr. 208-214, 240-248, 266, 283-287, 304-311, 331-332).

Testimony for the Government concerning Accardi's flight after his indictment in 1955 and his compulsory return from Italy to the United States on a presidential warrant appears at Tr. 375, 382, 392-405, 413-414.

Accardi on the stand in this trial denied all of the charges (Tr. 441-497), and he introduced proof of alibi concerning February 18, 1955 (Tr. 452-454), which was the day of the only narcotics delivery with which the Government linked Accardi other than by Zirilli's hearsay testimony of alleged statements to him by DiGregorio or Russo or other than by Accardi's own alleged after-the-fact admission to Zirilli concerning the first sale.

The testimony concerning Accardi's arrest (August 3, 1955) which the defense claimed was carried out terroris-

tically and with physical brutality against Accardi, his wife and three young sons was, for the defense, presented at Tr. 459-470, 473-479, 481-493, 506-545, 528-533, 589-652, 655-738, 816-824; and, for the Government (denying any terrorism or brutality) at Tr. 471 *et seq.*, 783 *et seq.*, 828 *et seq.*, 846 *et seq.*

The prosecution in this trial employed an ingenious method to bring before the Jury the testimony of a narcotic agent that in a conversation with Accardi after the latter's arrest and in another conversation after the indictment, both conversations being in the absence of his attorney, Accardi made statements which could be construed as inconsistent with innocence. Accardi had been asked by the cross examiner in this trial whether he had made certain inculpative statements to Agent Belmont, which Accardi denied doing (Tr. 577-581). Then, in "rebuttal" the Government called Agent Belmont to the stand (G40a *et seq.*). Belmont testified that he had a conversation with Accardi on August 4, 1955 at Accardi's arraignment before a United States commissioner in which Accardi had made no complaints about the conduct of the arresting officers on the preceding day (G40a); Belmont admitted he knew Accardi was represented by a lawyer at that time (G45a). Belmont further testified that on September 22, 1955 (which was after the filing of the indictment—August 15, 1955) he happened to meet Accardi unexpectedly in New Jersey, Accardi said he was trying to get his lawyer on the telephone, Belmont asked Accardi to help him get hold of another man who was nearby and whom Belmont wanted to serve with a subpoena, Accardi did this, Accardi then said to Belmont "Help me, help me", Accardi also said "I need

a lawyer", Belmont said "Well, you have a lawyer",* and then Accardi went on to protest his innocence (G40a-43a). Belmont said he then replied to Accardi that he knew all the details of the case and that he gave Accardi some of the details of the proof the Government had against him; that the whole case was "documented" and that Accardi would have a chance to prove his innocence in a fair trial before a jury (G43a). To this Accardi replied, according to Belmont, with admissions that he had seen DiGregorio and Russo twice at the gas station in New Jersey where Belmont said the Government could prove such meetings occurred; that he had also seen an agent DeMatteo who called himself Truglio,** at these meetings; that these persons had "talked narcotics" to him but that he had "chased them away"; and that DeMatteo (Truglio) had talked to Accardi "about $45,000 and a trip to Italy to get stuff" (G43a). Belmont further testified that he went on to ask Accardi "How can I help you", Accardi replied that "If the witnesses tell the truth, that would be it", and Belmont again assured him that the trial testimony would be truthful and Accardi would get a fair jury trial (G43a-44a). At this point in Belmont's "rebuttal" testimony the prosecutor, evidently unable to control his eagerness, asked Belmont the leading question "Was the name of Christoforo Rubino† mentioned?", to which the Court sustained a defense objection on the ground that the question was

---

* At this point in his testimony in this trial Agent Belmont said "Mr. Callandra was, to my knowledge, his lawyer" (G43a).

** The Government contends that "Truglio" was the undercover name of Zirilli (G44a).

† This Rubino had been prominently mentioned in Zirilli's testimony in this trial as a narcotics figure (Tr. 129-140, 170-171).

leading and suggestive (G44a). The prosecutor then further questioned Belmont as follows (G44a):

> "Q. Was there any further conversation? A. We talked about other people that were—I don't know how to put this now; whether he knew certain people that were in the same investigation—(886) let's put it that way—and I mentioned to him several names of different people, one of whom was Christoforo Rubino. He said he knew him from Brooklyn but denied that he had talked to him on the phone or had any transactions with him."

We respectfully note the indications in our foregoing recital of Agent Belmont's "rebuttal" testimony that Belmont evidently knew how to take adroit advantage of his post-arrest and post-indictment conversations with Accardi in the absence of the latter's lawyer, and that this interrogational harvest was well spread before the Jury in this trial.

It remains to note (in this Statement of the Case) the following details of the impact of the sentence here imposed on Accardi: With the elimination from the case of Count 4 (a "registration" and "tax" count relating to the alleged sale of February 18, 1955) (10a), the case against Accardi as submitted to the jury consisted of a "sale" count and a "stamped package" count relating to the alleged transaction of January 31, 1955 (counts 1 and 2), a "sale" count relating to the alleged transaction of February 18, 1955 (count 3), and the conspiracy count (count 5). The jury convicted Accardi under all four of these counts (76a-77a). On each of the three substantive counts on which he was convicted (counts 1, 2 and 3) Accardi was sentenced to five years and was fined $2,000. On the conspiracy count

he was sentenced to five years and fined $10,000. The prison sentence on count 2 was to run consecutively to and to begin after the sentence on count 1; the prison sentence on count 5 was to run consecutively to and to begin after service of the sentences on counts 1 and 2. Execution of the prison sentence on count 3 was suspended and the defendant was placed on probation for one day. The fines, totalling $16,000, were to be paid or the defendant was to stand committed until such were paid or he was otherwise discharged according to law.

It will thus be observed that, in effect, no prison sentence was imposed on any substantive counts relating to the alleged transaction of February 18, 1955 because, as seen, one of those February 18 counts (count 4) was dismissed and on the other (count 3—the sale count) the execution of the prison sentence was suspended. Thus, the fifteen year prison sentence imposed on Accardi was, in effect, ten years for the alleged sale of January 31, 1955, and an additional five years for the conspiracy count.

The Court of Appeals, in affirming the conviction, rejected our contentions addressed to Agent Belmont's testimony of the alleged admissions by Accardi, the charge on reasonable doubt, the reception in evidence of non-segregated hearsay under the substantive counts and of matters beyond the scope of the indictment, and the consecutive sentences.

Reasons for Granting the Writ

1. The alleged post-arrest and post-indictment statements made by Accardi to Agent Belmont in the absence of Accardi's attorney were seriously inconsistent with Ac-

cardi's trial testimony and must surely have raised a suspicion in the jurors' minds that Accardi had guilty knowledge. Belmont's testimony was manifestly designed to make it appear that Accardi had inculpated himself and this design was accomplished. This seems to us to be clearly forbidden under *Massiah* v. *United States*, 377 U.S. 201 and *Escobedo* v. *Illinois*, 378 U.S. 478. Cf. the constructive and forward-looking way in which the *Massiah-Escobedo* principles have been taken up in e.g., *United States* v. *Guerra*, 334 F. 2d 138, 144-145 (C.A. 2 1964) and *People* v. *Dorado*, 40 Cal. Rptr. 264, 394 P. 2d 952 (S. Ct. 1964). The Court below in our case deemed that *Escobedo* and *Massiah* are distinguishable because the post-indictment conversation—

> " * * * at the Bloomfield gas station was initiated entirely by Accardi as a protest of his innocence. There was no inducement offered him to make the statements, nor were they made because of any deception practiced upon him or through an attempt by Belmont to interrogate him. On the contrary, Accardi volunteered his statements to Belmont who had made the trip to Bloomfield for an entirely different reason, who encountered Accardi by chance and who did not ask Accardi a single question concerning the merits of the case.
>
> The appellant does not claim that Accardi's statement to Belmont was other than voluntary nor does he claim that there was any interrogation or attempt at interrogation by the agent. * * * "

Aside from the fact that this language of the Court below seems to us to rest upon an over-simplified reading of the true principles of *Massiah* and *Escobedo*, the language quoted is in error in stating that Belmont did not question

Accardi; clearly he did so when in the portion of his testimony earlier quoted from G44a Belmont said that he and Accardi "talked about * * * whether he knew certain people that were in the same investigation * * * and I mentioned to him several names of different people, one of whom was Christoforo Rubino". Also, in the post-arrest conversation of August 4, 1955—the first of the two Belmont-Accardi conversations, not discussed in the opinion below—Belmont said he asked Accardi whether the latter had any complaints about the conduct of the arresting officers on the preceding day (G40a, 44a-45a); Accardi's allegedly having answered this in the negative was, of course, inconsistent with his trial testimony about the arresting agents' terrorism and brutality—all of which was important for Accardi's defense because he claimed that his flight in 1955 did not manifest a consciousness of guilt but a feeling of terror and despair over his chances for a fair trial. The Court below also quoted this Court's language in *Walder* v. *United States*, 347 U.S. 62, 65 to the effect that

> "[A defendant] * * * must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."

We respectfully suggest that this Court might wish to reconsider, in the light of *Massiah* and *Escobedo*, the theme of the second of the above quoted sentences from *Walder* and whether it is consonant with *Massiah* and *Escobedo* to apply this *Walder* theme to the facts of our case.

2. Accardi was illegally convicted on the basis of charges and proof of an alleged scheme to import heroin which was outside the purview of the indictment. The alleged importation scheme was initiated by Agent Zirilli after the second alleged sale (February 18, 1955). The indictment mentions nothing about any alleged importation scheme. The Court below held this importation matter to be within the scope of the indictment because the conspiracy charged was alleged to have continued to the date the indictment was filed (August 15, 1955), the alleged importation discussions having taken place during March and May, 1955. We have found no authority for the proposition that the Government, by a mere blanket or semi-open-end averment as to the period during which an alleged conspiracy continued, may then, at the trial, unrestrainedly range free over the entire "continuous" period alleged and bring before the Jury alleged conspiratorial activities of whose existence the indictment contains no mention or remotest clue to alert the defense that such might be expected. In a very real sense, this sort of indictment practice in a conspiracy case nullifies a defendant's right under the bill-of-particular procedures of the Federal Rules. For in a case like the present one the defendant has no occasion to expect or to divine that the Government may be planning to "ring in" an entirely new and separate alleged conspiratorial situation into the case. One can just hear the Government crying "fishing expedition" if a defendant were to have the temerity to move for such a purely exploratory bill of particulars. The aggrievement here, then, is not merely variance, but also, we seriously contend, due process violation of the right to adequate notice of the charge against which the defendant is called upon to prepare his defense.

3. The point now to be mentioned is one upon which we frankly (though unsuccessfully) besought the Court below to "make new law". Agent Zirilli testified that on February 16, 1955 Accardi told him that he had himself tested out the "first buy" (G21a). Prior to that, the narcotics agents, according to their testimony, had already "caught" Russo and DiGregorio. Now, on February 16 they had also "caught" Accardi. At that point, then, the Government had its "case", against all three of the defendants. In any event, the Government had its case against all three defendants perfected (under the Government's evidence) on February 18, 1955, when the second alleged sale and delivery were carried out. We respectfully contend that everything which allegedly happened after the February 16 conversation of Zirilli with Accardi, or in any event after the February 18 alleged sale and delivery, was "post-conspiracy". Once the investigative net was closed around all three of the defendants, nothing which thereafter happened was or could have been "in furtherance of the conspiracy". On the contrary, it could only have been in furtherance of the Government's efforts to bury the already dead conspiracy. Or, at best (from the viewpoint of the Government), everything which happened after February 16 or February 18 was concerned with a necessarily new and separate conspiratorial effort, not charged in the indictment, the original conspiracy being effectively at an end through the defeat thereof by the Federal narcotics police. The novel step which we are asking this Court to take in these premises is to rule that a conspiracy is just as effectively defeated, in contemplation of law, when the investigative net has closed around the conspirators, as is true when the conspiracy has "ended in success or failure" for

any of the reasons which the law presently recognizes as marking the termination of a conspiracy—for the purposes of the admission in evidence of declarations of co-conspirators made in furtherance of the conspiracy. *Krulewitch* v. *United States,* 336 U.S. 440, 442-444. This novel extension which we are asking the Court to accept has much to favor it as a matter of justice and fairness, especially in the circumstances of the instant case. If the Government had a perfected case, both substantive and conspiracy, based on the alleged January 31 sale and Accardi's alleged admissions of February 16, what conceivable interests of wholesome public policy or of legal justice were served by having the Government's agents continue to lure the defendants into further narcotics traffic (and on an allegedly large scale, to boot)? And even if there were some such valid interest in the conduct of the Government agents after February 16 or February 18, is it not unjust to bring on a prosecution, as here, in which an ostensibly unified conspiracy charge is used as a guise for circumventing the rule against post-conspiracy hearsay? The injustice of the situation is aggravated when we remember also that the whole investigative project after February 18 had to do with an attempt initiated by the Government agents themselves to draw Accardi and the co-defendants into an entirely new and separate importation scheme to get heroin in large quantities from Italy, to be financed by some $45,000 in Government money. And surely, as earlier urged, the testimony relating to this latter alleged importation phase had no place in this trial. The overall injustice is further aggravated when consideration is had of the disturbing circumstances of duplicity or multiplicity of the charges and the sentences imposed in this case. We take up the duplicity aspect separately *infra,* but we may here

mention that one incidental consequence of the Government's having chosen to continue luring the defendants after the net had closed on February 16 was the inclusion in this indictment of the substantive counts relating to the alleged sale of February 18. The Government might answer that if they had stopped (in this indictment) with the substantive charges and the conspiracy count confined to the happenings surrounding the alleged sale of January 31, they would have encountered a defense objection in regard to the conspiracy count based on the "single isolated transaction" rule. But what is the purpose of our laws against crime? Is their purpose to catch and punish a man when he has committed a crime, or is their purpose to make life more fruitful for Government prosecutors and investigators? And it is especially unappealing to suggest that the desire of Government prosecutive or investigative personnel in a particular case to utilize a conspiracy-prosecutive device, whose propensities for cancerous proliferation are notorious, may justify this sort of luring-on of defendants to multiply or to compound their alleged crimes. To be sure, our argument addressed to the features of this case which post-dated the closing of the investigative net on February 16 or February 18, 1955, is not in terms of classic entrapment, but it is akin to an entrapment argument. Cf. the standards formulated by the dissenting Justices in *Sherman* v. *United States*, 356 U.S. 369, 382, that Federal courts should inquire whether "police conduct" has fallen "below standards, to which common feelings respond, for the proper use of Governmental power." *

---

* The majority opinion in *Sherman* does not reject the latter test (for entrapment cases); it merely declines to abandon the additional test of whether the defendant's induced conduct was due to his own readiness. 356 U.S. at 376-377.

4. There was applied in this trial, and approved by the Court below, what may be termed the "principal-agent-hearsay" rule of, e.g., *United States* v. *Campisi,* 248 F. 2d 102, 105-106 (C.A. 2 1957), cert. denied 355 U.S. 892, whereby hearsay evidence is received to prove guilt under substantive charges of crime when the hearsay derives from an "agent" of the accused in the course of a "single, comprehensive arrangement". Absent this "principal-agent-hearsay" rule, the mass of hearsay testimony in our case would have been admissible only under the conspiracy count.* The pertinent language from the above-cited *Campisi* case is (248 F. 2d at pp. 106-107):

> "* * * It [the hearsay] was also admissible in support of the substantive charge on the same theory, as an admission by an agent in the course of the performance of his agency. Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278; Lutwak v. United States, supra, 334 U.S. at pages 617, 618, 73 S. Ct. 481; Krulewitch v. United States, 336 U.S. 440, 442-443, 69 S. Ct. 716, 93 L. Ed. 790; Wolcher v. United States, 9 Cir. 233 F. 2d 748, 750; 4 Wigmore, Evidence §1079. For all the sales were made pursuant to the single, comprehensive arrangement. * * *"

Of the several decisions cited by the Second Circuit in the above quotation from *Campisi*—which is the current leading case on this agency-hearsay topic in that Circuit—the only one which has any colorable tendency to support the use of the agency theory for admissibility of hearsay evi-

---

* Even in a conspiracy prosecution as such, the question of admission of such hearsay testimony has continued to be regarded as one of peculiar difficulty. *Delli Paoli* v. *United States,* 352 U.S. 232; *Lutwak* v. *United States,* 344 U.S. 604; *Krulewitch* v. *United States,* 336 U.S. 440.

dence under substantive charges is the *Wolcher* case. *Wolcher* is the only one of the cases cited in the above quotation which did involve a charge of substantive crime rather than conspiracy, but even in *Wolcher* the "agency" point was involved only indirectly and indeed it would appear to have been merely *dictum.* As to the other cases cited in *Campisi* for this point—*Delli Paoli, Lutwak* and *Krulewitch*—none even involved any substantive charges, except *Krulewitch* where, so far as we have been able to ascertain from the decision of this Court and from the two reported decisions of the Second Circuit, the issue as to the admission of hearsay either related solely to the conspiracy count, or was not litigated with respect to the substantive counts. See *Krulewitch* v. *United States,* 336 U.S. 440; *United States* v. *Krulewitch,* 167 F. 2d 943 (C.C.A. 2 1948), reversed 336 U.S. 440; *United States* v. *Krulewitch,* 145 F. 2d 76 (C.C.A. 2 1944). Furthermore, even in *Campisi,* the significant language of the Court for the applying of the agency-hearsay theory under the substantive counts was that " * * * all the sales were made pursuant to the single, comprehensive arrangement" (248 F. 2d p. 106). Aside from the fact that this is language which more properly describes the *conspiracy* phase of a situation rather than a substantive-"agency" phase, it is when we examine historically the pre-*Campisi* cases which evolved this so-called "agency" rule for admission of hearsay to prove substantive charges of crime,* that we perceive most clearly the gravity of the question. The earlier cases to which

---

* None of which earlier cases, by the way, were cited in *Campisi,* where, instead, the Court cited cases which, as above noted, were not in point. Incidentally also, *Campisi,* according to Shepard's, has apparently never been cited by any Federal court for the point in question.

we refer do admittedly hold that hearsay is admissible under substantive counts in Federal criminal cases on an "agency" theory. But our study indicates that: (1) under the best-reasoned of the pre-*Campisi* cases, the test is not some merely abstract or formulary invocation of the word "agency", but whether in fact it convincingly appears that a legally meaningful relationship of "principal-agent" was proved in the particular case; and (2) none of the cases have considered what we deem to be the distinct (and vital) aspect of whether duplicity or multiplicity results when, as in our case, the "agency" approach to the substantive counts makes them indistinguishable from the conspiracy count. The earliest case in the Second Circuit seems to be *Goldsmith* v. *United States,* 42 F. 2d 133, 138-139 (C.C.A. 2 1930), a prosecution for the use of a false immigration document. It would be difficult, in view of the facts in *Goldsmith,* to imagine a clearer or a more concrete case of direct "agency" than the one involved in that case, where the defendant was shown to have been in every sense "master" and principal in the situation. The *Goldsmith* case cited several decisions of this Court in which also the facts plainly spell out an actual principal-agent relationship. Thus, in *United States* v. *Gooding,* 12 Wheat. (25 U.S.) 460 (cited in *Goldsmith, supra*), a prosecution for slave trading, where the "agency" doctrine here in question seems to have originated, Mr. Justice Story spelled out in the most meticulous way the facts establishing the agency relationship, the agent there being the master of the slave ship and the principal (who was the defendant in the prosecution) being the ship owner. Thus also, in *American Fur Co.* v. *United States,* 2 Pet. (27 U.S.) 358 (cited in *Goldsmith, supra*), the *Gooding* case was applied

to allow the admission of hearsay in a proceeding upon a libel or information to forfeit liquor that had been illegally sent into Indian territory, the hearsay consisting of statements by one Davis who was acting directly in conjunction with or as the agent of one Wallace, a licensed Indian trader. Similarly, in *Cliquot's Champagne,* 3 Wall. (70 U.S.) 114 (cited in *Goldsmith, supra*), where the Supreme Court cited and followed the *American Fur Co.* case, *supra,* the facts were that the hearsay evidence was given by the explicitly advertised sales agents for the Cliquot Company —whose champagne had been forfeited in this case by reason of a false customs invoice. Also distinguishable are *United States* v. *Olweiss*, 138 F. 2d 798, 799-800 (C.C.A. 2 1944), cert. denied 321 U.S. 744, and *United States* v. *Perillo,* 164 F. 2d 645, 646-647 (C.C.A. 2 1947) —neither of which decisions were cited or relied upon in the *Campisi* case. In *Olweiss* there was clearly presented a business partnership arrangement whcih pointed to the unquestionable "agency" character of the situation. In *Perillo,* a narcotics case, the main prosecution witness actually saw one of the defendants talking to the appellant (against whom the agency-hearsay was received) and going back and forth between the appellant and the witness to negotiate the terms of the sale of heroin. Likewise *United States* v. *Sorrentino,* 78 F. Supp. 425 (M.D. Pa. 1948) involved "agency" hearsay from co-defendants who were members of an obviously well-established prostitution ring. Of special interest is *United States* v. *Miller,* 246 F. 2d 486 (C.A. 2 1957) where the "agent" was a bank guard whom the "principal", as president of the bank, had used to carry messages etc., and where the point which is of special interest here was the Court's recognition of the fundamental

rule of law that "* * * the agency cannot be proved by the hearsay statements of the alleged agent himself". This means that no hearsay statements of any of the co-defendants in the present case can suffice to establish an agent-principal relationship. The agency-hearsay doctrine seems to wipe out altogether any significant distinction between conspiracy and substantive charges in a case of this type. Multiple charges, multiple convictions and multiple punishment become all-but automatically assured to the Government in practically any conspiracy case by adding to the indictment substantive counts derived from the incidents of the conspiracy. We respectfully urge that these questions should not be deemed to have been embraced in those which are said to have been put to rest in *Pinkerton* v. *United States*, 328 U.S. 640.

5. As seen, the concrete impingement of the entire fifteen-year sentence in this case may reasonably be said to be on account of the alleged first sale alone (January 31, 1955). Of the two substantive counts relating to that sale, one is a "sale" count and the other a "tax" count. We submit that the circumstances of the consecutive five-year sentences imposed on these two counts—plus the five-year conspiracy sentence—merit this Court's review notwithstanding *Gore* v. *United States*, 357 U.S. 387 and *Block-Burger* v. *United States*, 284 U.S. 299.* The "stamped package" provision of 26 U.S.C. § 4704(a), which is the basic provision involved in Count Two of this indictment (relating to the January 31 alleged sale), is part of the "regulatory tax" part of the narcotics provisions of the Internal Revenue Code (26 U.S.C. §§ 4701, *et seq.*), i.e., a

* Also notwithstanding (as to the conspiracy sentence) *Pereira* v. *United States*, 347 U.S. 1.

regulatory tax on narcotics measured by the weight of a narcotics package. It is familiar that, such a taxing provision being based upon the tax power of Congress, as distinct from its power to regulate interstate or foreign commerce, does not require in criminal prosecutions for violation of the tax provisions that the Government prove importation of the narcotics or knowledge of importation; the Congressional "jurisdiction", in other words is sufficiently afforded by the tax power itself, whose purview over the articles or activities being taxed does not depend upon any question of ultimate geographical origin or transit status—unlike the situation where Congress may obtain "jurisdiction" under the foreign commerce power only if the article or activity involved possesses the requisite foreign commerce character. From these familiar features of the present Federal narcotic laws relating to "sales", regulatory tax and occupational tax, it seems to us fair to suggest further as follows: Congress has apparently seen fit to arm the Federal narcotics prosecutors with an alternatively available set of enforcement provisions, in the manner of the statutes above mentioned, because, as is well known, it not infrequently happens that in prosecutions under the sale, possession etc., provisions of 21 U.S.C. §§ 173 and 174, where the Congressional jurisdiction depends upon the foreign commerce power, it is difficult or impossible to prove the constitutionally requisite "possession" of which proof is needed in order to invoke the statutory presumption of knowledge of importation. Or, it may even happen in a rare or occasional case that a defendant might be able to explain the possession in such a way as to rebut the presumption of knowledge of importation or the fact of importation. In such situations, then, the Government has available to it the regulatory tax and

the occupational tax provisions, under which prosecution and conviction are much easier because the "importation" problem is absent. What we are suggesting, therefore, is that in fairness these respective provisions relating to "sale", etc., regulatory tax and occupational tax should, at least in the general course of prosecutions in the narcotics area, be viewed as *alternatives* to the sale-possession type of prosecution, rather than as affording to the Government multiple or cumulative opportunities for "hitting" a defendant with consecutive sentences on account of what actually amounts to a single narcotics transaction. Reasoning, and policy considerations, of the sort above suggested have been persuasive in two cases which we have found, where the essentially "duplicitous" character of a narcotics prosecution involving both sale counts and tax or registration counts has been recognized and relief has been afforded to the defendant. We refer to *Eori* v. *Aderhold*, 53 F. 2d 840 (C.C.A. 5, 1931), and *Cain* v. *United States*, 19 F. 2d 472 (C.C.A. 8 1927). While we cannot claim that the *Eori* and *Cain* cases are directly in point for the purposes of an argument of literal duplicity in regard to Counts One and Two of the present indictment, we respectfully call these decisions to the Court's attention as supporting our theme that the consecutive sentences imposed in this case in relation to the January 31 alleged sale are disturbing to the sense of justice, especially so when viewed in the setting of the case as a whole.

6. The instructions to the Jury in this case on reasonable doubt (27a-28a) included the statement that "It is that kind of doubt which would cause you to hesitate in the important matters of your life before you would take action." This language that a reasonable doubt is something that would

cause a man to *hesitate* to act not only puts the matter exactly backwards but it hopelessly ruins the beneficial quality of an instruction on reasonable doubt from the point of view of a defendant. The correct formulation, in terms of how a man would act in the important affairs of his own life, is an *affirmative* formulation, e.g., "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs" (*Jury Instructions and Forms For Federal Criminal Cases*, Hon. William C. Mathes, 27 F.R.D. 39, 48). The very real practical difference between the negative (or hesitational) and the affirmative (or actional) forms of the instruction may be perceived thus: Let us suppose that any average layman, whether he happens to be a criminal defendant at the time or not, is asked, "Would you rather have your fate determined by a Jury which has been told by the Court that they *cannot convict* you unless they are as sure of your guilt as they have to be to go forward and take one of the most important actions in their lives, or would you rather have your fate decided by a Jury which has been instructed by the Court that they *are to convict* you unless they have the kind of doubt about your guilt that would make them hesitate before deciding to move ahead into one of the most important actions of their lives?" Can there be any question that any layman to whom the above choice is put would, at least after a little thought on the subject, far rather have the first of the above suggested alternatives? The reasons for this are not hard to see. A man who has to be sure enough of something to bring him to the point of decision, to actually move ahead affirmatively into one of the most important actions of his life, has to have a very strongly convinced kind of feeling of certainty indeed; ap-

plying this to the situation of a juror who is called upon to decide the guilt or innocence of a defendant, such juror would have to feel very strongly convinced indeed before voting for conviction, i.e., he would have to feel very strongly indeed that he is not troubled by any reasonable doubt and therefore he can and should move forward affirmatively to decree conviction. On the other hand, a person who is contemplating one of the most important actions of his life but who has a doubt which is causing him to hesitate, might be experiencing such a hesitational doubt on any one of numerous levels and in any one of numerous ways, both quantitative and qualitative. No one can say what will cause a particular individual to hesitate before moving affirmatively into an important action of his life. It is also true, we admit, that no one can say with mathematical exactitude or even with satisfactory philosophical-logical words, just how much of a feeling of strongly convinced certainty will cause any particular individual to move forward affirmatively in an important action of his life. But in the former case (the hesitational situation) it seems self evident, as a matter of common human experience and understanding, that different individuals would or might vary far more widely from each other in their ultimate motivated reasons for hesitation, than would be true of the situation where individuals are trying to decide whether to embark affirmatively upon an important action on the basis of a really strongly convinced feeling of certainty that it is right, proper and necessary to do so. Putting it in another way, in the hesitational situation the man of relatively less prudent or less wise or less well-trained mind and understanding would often be less likely to hesitate to take the important action (which is to say, here, he would be less likely

to hesitate to convict a criminal defendant), than would be the wiser, more prudent, more disciplined-minded man (or juror); and this variability, the unpredictable and imponderable range of subjectivity among jurors, is a very dangerous factor for the criminal defendant, and for the just operation of the rule of reasonable doubt. On the other hand, in the purely affirmative situation—as distinct from the hesitational situation—the criminal defendant gets the benefit of a chance for acquittal at the hands of the more cautious, the more prudent, or, if one will, the more sober-minded of the variant members of the community from which jurors are drawn. In a word, then, it takes (and it should take) much more of a strong prosecutive case to convict a defendant under the affirmative form of the "important actions" idea, than under the negative or hesitational form. And the existence of this obvious and important difference is in and of itself a matter which seems to us to call cryingly for the most deliberate and thorough kind of appellate consideration of which of the two forms of this phase of the instruction on reasonable doubt is the correct one.

A study of the pertinent Federal cases reveals the following interesting developments in this area (we take up the cases chronologically): In 1878, in *Lilenthal's Tobacco* v. *United States*, 97 U.S. 237, this Court emphasized the central idea which we are here urging, namely that the test of reasonable doubt must be structured around the requirement that the jury must be satisfied beyond a reasonable doubt of the rightness and necessity of taking the *affirmative* action of convicting the defendant. In 1883, in *United States* v. *Wright*, 16 Fed. 112, 114 (C.C.E.D. La. 1883), the affirmative form of the instruction was used. In 1887 this Court ap-

proved the affirmative form of the instruction. *Hopt* v. *People of Utah,* 120 U.S. 430. In 1886 and 1887, in *United States* v. *Jackson,* 29 Fed. 503 (C.C.S.D. Ga. 1886) and in *United States* v. *Jones,* 31 Fed. 718 (C.C.S.D. Ga. 1887), there occurred the first obtrusions we have found, albeit in a rather ambiguous form, of the negative or hesitational idea.* In 1888, in *United States* v. *Meagher,* 37 Fed. 875, 881-882 (C.C.W.D. Tex. 1888), the affirmative form was again used. On the other hand, also in 1888, another Federal court in Texas seems to have slipped into the negative or hesitational form of the instruction. *United States* v. *Hughes,* 34 Fed. 732 (N.D. Texas. 1888).** In 1891, in *United States* v. *Heath,* 9 Mackey 272, 20 D.C. 272 (Dist. Col. Sup. Ct. 1891), the affirmative form was approved. The hesitational form of the instruction next appeared, in 1912, in *Pettine* v. *Territory of New Mexico,* 201 Fed. 489, 496 (C.C.A. 8, 1912), but in an ambiguous form combining both the hesitational and the actional ideas. In 1916 the Ninth Circuit, citing the *Hopt* case, *supra,* approved the affirmative form. *Shepard* v. *United States,* 236 Fed. 73, 80 (C.C.A. 9, 1916). In 1917 the hesitational form again appeared, in *United States* v. *McHugh,* 253 Fed. 224, 231 (W.D. Wash. 1917). The hesitational form of the instruction, albeit in a more rational form (because combined with the idea of what is needed for an abiding conviction of guilt) was formulated in 1923, in

---

* These instructions by Circuit Judge Speer were expressly disapproved by the Nebraska Supreme Court in 1888 in *Carr* v. *State,* 37 N.W. 630, 631-632 (S. Ct. Neb. 1888), where the entire hesitational idea was evidently discountenanced (citing other State cases).

** Oddly, the Reporter's annotation to this case in vol. 34 of the Federal Reporter (p. 732) cites the *Carr* case, from Nebraska, *supra,* as authority for the hesitational form; but *Carr,* as seen, had held just the opposite. It is thus that "false doctrines" may be born and go on to flourish.

Egan v. *United States,* 287 Fed. 958, 967 (App. D.C. 1923). The hesitational form is found also, in 1931, in *United States* v. *Brunett,* 53 F. 2d 219, 234 (W.D. Mo. 1931). The hesitational form was again approved, in 1940, in *Bishop* v. *United States,* 107 F. 2d 297, 303 (App. D.C. 1940). The hesitational form appeared also, in 1943, in *United States* v. *Haupt,* 47 F. Supp. 836, 840 (N.D. Ill. 1942), reversed on other grounds 136 F. 2d 661. In 1949, in *United States* v. *Foster,* 9 F.R.D. 367, 377 (S.D.N.Y. 1949), Judge Medina (then a District Judge) charged the jury in the affirmative form. The affirmative form was also used in 1952 in *United States* v. *Schneiderman,* 106 F. Supp. 906, 924, 927 (S.D. Cal 1952). The hesitational form again appeared, in 1952, in *United States* v. *Belisle,* 107 F. Supp. 283, 285 (W.D. Wash. 1952).

We suggested above that the problem of the hesitational versus the affirmative or actional form of this type of instruction on reasonable doubt is deserving of authoritative appellate reconsideration at this time. Apparently, no Federal court has yet come to grips with the problem of which of these two alternative forms is the correct one. An interesting confirmation that the problem has thus far apparently escaped notice in the Federal courts is found in *Holland* v. *United States,* 348 U.S. 121, 140, where the Court said:

> "Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as 'the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States, 71 App. DC 132, 107 F2d 297, 303,

> rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. 'Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the mind of the jury,' Miles v. United States, 103 US 304, 312, 26 L ed 481, 484, and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury."

It will be observed that the counsel who raised the issue as described in the above question in the *Holland* case were apparently not alert to the phase of the problem which we are here raising in regard to the hesitational type of instruction; instead, counsel in the *Holland* case seem to have been preoccupied with the semantical problem of whether a doubt is something that a jury could "act upon";* and apparently this Court preferred to let matters rest as they were for the purposes of the *Holland* case. In any event, with a view to making sure whether or not the issue in the form in which we are here urging it was litigated in the *Holland* case, we have examined the briefs of the parties in this Court in that case, including the petition for certiorari and the brief in opposition thereto, and we can state that the problem in the form in which we are here posing it was not discussed in any of the papers of any of the parties in the *Holland* case in this Court—with the single qualification that, in the unsuccessful petitioner's petition for

---

* Cf. *Hooper* v. *United States,* 216 F. 2d 684 (C.A. 10, 1955), involving a similar instruction.

rehearing, the problem in the form in which we are here urging it was for the first time alluded to, but only in a coincidental and unelaborated way; we need hardly point out that a denial of a petition for rehearing after a decision on the merits in this Court has little significance for the merits of the points urged in the unsuccessful petition for rehearing. It therefore appears that the way is open for this Court to "grasp the nettle", and we respectfully urge the Court to take up our issue as to the hesitational *versus* the affirmative form of the instruction on reasonable doubt as being a doubt which concerns weighty or important affairs in one's life.* We submit also that, if the Court sees arguable certiorari merit in our contention that the affirmative form of the instruction is the proper one, and that the hesitational form is improper, the error thereby arising in the Trial Court's instructions to the Jury on reasonable doubt in our case would plainly call for a reversal of the judgment of conviction, since this trial record presented to the Jury serious and substantial factual issues for their determination under a proper instruction on reasonable doubt.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS,
Attorney for Petitioner
Sam Accardi.

---

* The Court below in our case rested its decision on this point on the *Holland* case.

APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 316—September Term, 1964.

(Argued January 26, 1965 Decided March 10, 1965.)

Docket No. 29234

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAM ACCARDI,

Appellant.

Before:

WATERMAN, SMITH and ANDERSON,

Circuit Judges.

Appeal from judgment, on convictions by jury, for violations of the narcotics laws: 21 U. S. C. §173 and §174, 26 U. S. C. §§4704(a), 4701, 4703, 4771(a), 7237(a) and conspiracy to violate the narcotics laws 18 U. S. C. §371 on four counts, in the United States District Court for the Southern District of New York, John M. Cannella, *J.* Affirmed.

PETER FLEMING, JR., Ass't U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Attorney, Southern District of New York, and Neal J. Hurwitz, Ass't U. S. Atty., on the brief), *for Appellee.*

JEROME LEWIS, Esq., Brooklyn, N. Y., *for Appellant.*

ANDERSON, *Circuit Judge*:

The Government offered evidence to prove and the jury could reasonably have found that a narcotics agent, Anthony Zirilli spoke with co-defendant DiGregorio on January 4, 1955 concerning the purchase of heroin. On the afternoon of January 31, Zirilli met with DiGregorio and co-defendant Russo at a Brooklyn restaurant. After some discussion about prices, Zirilli agreed to purchase a one-half kilogram of heroin for $5,000. The transfer of heroin for cash was to be made that evening. During the course of the discussion, Russo indicated that he was not the source of supply, that he needed to travel some distance to get it and that he would therefore need an hour and a half after receiving the cash before he could deliver the heroin.

In the early evening, after the cash had been advanced, narcotics agents followed DiGregorio and Russo to the neighborhood where the appellant Accardi resided in Bloomfield, New Jersey. The agents then lost track of the car. Back in New York around 9 o'clock the same evening, Russo handed over the narcotics to Zirilli.

In February, Zirilli staged a party for a special employee of the Federal Bureau of Narcotics to which he invited DiGregorio and Russo. During the afternoon before the party Zirilli had informed DiGregorio that he was dissatisfied with the heroin because it had been diluted, and that he would like to take up the matter with the source of

supply. At the party Russo inquired about the trouble and offered to call his supplier. He then placed a call to Accardi's number in Bloomfield. After the call he told Zirilli that his man had said that the heroin was "pure, unadulterated," but that he could return the heroin for a refund if he were still dissatisfied. The offer was declined on the ground that the stuff had already been sold. But on February 12th Zirilli told DiGregorio that the "first buy" was no good, and that in the future he wanted to deal directly with the source, who by now was referred to as Sam. Four days later, February 16th, a meeting between Zirilli and Accardi was arranged in Bloomfield. Accardi vouched for the quality of the heroin, said it was "95% pure," although "[his] man said it was only 75% pure." He assured Zirilli that everything would be all right on the next buy, and that he should deal with Russo and DiGregorio and return the heroin if he were dissatisfied with the quality in the future.

A sale of approximately one kilogram was consummated on February 18th. Accardi was observed as a participant in the transaction, though DiGregorio was the direct supplier.

Later in February and again in April Zirilli spoke to DiGregorio about a proposal to pick up heroin in Italy. As a result of these conversations Accardi met Zirilli in a Bloomfield gas station. They discussed and agreed upon a purchase from Italy of ten kilograms of heroin for $40,000. Accardi agreed to write to his people in Europe to make the arrangements. On May 6, Zirilli was informed that Accardi received a letter from Italy refusing the proposal.

Accardi was arrested on August 3rd and indicted on August 15th. He pleaded not guilty to each count of the indictment and was released on bail in the amount of $75,000. He later failed to appear at a calendar call, and was next discovered in 1956 residing in Sicily. He was brought to the United States in custody in November 1963 under a Presidential warrant.

Accardi testified in his own defense. He denied knowing or meeting Zirilli at any time prior to trial. He admitted knowing Russo and DiGregorio,[1] but denied discussions with them concerning narcotics or participation with them in the delivery of narcotics. He admitted his 1955 flight, which he said was provoked by concern for a fair trial and fears for his safety which were engendered by the violent manner in which he claimed he was arrested. The arresting agents denied this account of the arrest and denied ever threatening or even seeing Accardi subsequent to his arrest.

Accardi was charged in a five count indictment. The jury found him guilty on the first count which alleged that on or about January 31, 1955 he received, concealed, sold and facilitated the transportation, concealment and sale of heroin in violation of 21 U. S. C. §173 and §174. It also found him guilty on the second count which charged that on or about January 31, 1955, he sold, dispensed and distributed heroin which was not from the original stamped package, in violation of 26 U. S. C. §4704(a), §4701, §4703, §4771(a) and §7237(a). It convicted him on the third count which charged him with a violation of 21 U. S. C. §173 and

---

[1] Russo and DiGregorio, who were charged as codefendants with Accardi in all five counts of the indictment, pleaded guilty to 3 counts in 1955. Counts 2 and 4 were dismissed upon consent of the Government.

§174, similar to that in Count One but in connection with the events of February 18, 1955. It also found him guilty on the fifth count of conspiracy to violate the narcotics laws, 18 U. S. C. §371.

Accardi has raised a large number of claimed points of error on this appeal, which essentially reduce themselves to the issues discussed.

He complains that the negative form of the definition of reasonable doubt given by the trial judge in his charge to the jury was improper and resulted in the denial of a fair trial. Accardi took no exception to that part of the charge which included the definition in question, and which was as follows:

> ". . . A reasonable doubt is a doubt which is based upon reason. It is not a speculative doubt. It is a substantial doubt. It is that kind of doubt which would cause you to hesitate in the important matters of your life before you would take action. . . ."

This negative form of the definition of reasonable doubt was not only approved, but recommended by the Supreme Court in *Holland* v. *United States,* 348 U. S. 121, 140 (1954). The appellant certainly suffered no prejudice in this regard.

He also complains that his conviction resulted from the admission into evidence of non-segregated hearsay testimony, under an erroneous theory of agency, and of matters beyond the scope of the indictment.

Much of the case against Accardi, especially with reference to the substantive counts, was based on Zirilli's testimony about the acts and declarations of DiGregorio and Russo. The trial judge admitted this testimony subject to connection, and he instructed the jury on each occasion that

the acts and declarations of either DiGregorio or Russo were binding on Accardi only if Accardi's membership in the conspiracy was first established by independent evidence of Accardi's own acts and declarations made in furtherance of the conspiracy.

Evidence of Accardi's acts and declarations established that the undisputed sales of heroin were made pursuant to a single comprehensive arrangement between Accardi, DiGregorio and Russo. For example, Accardi told Zirilli on February 16th that the narcotics had not been cut, that he had tested the heroin himself. When Zirilli asked Accardi who would be responsible for the "next buy," Accardi told him not to worry, to continue dealing with Russo and DiGregorio, and to return the narcotics for a refund if he were still unsatisfied. In addition to his role as a guarantor, Accardi was observed in Brooklyn on February 18th, the day of the second sale, meeting with DiGregorio immediately prior to the delivery of the heroin to Zirilli. There was also evidence of the meeting on April 28th, between Accardi and Zirilli at the Bloomfield gas station, at which the scheme for the direct importation of heroin through Accardi's contacts in Italy was discussed, which further underlined Accardi's dominant role in this criminal partnership. The evidence clearly established Accardi's awareness of and participation in the conspiracy that resulted in the two sales. His 1955 flight from prosecution was also evidence from which an inference of Accardi's consciousness of guilt could be drawn. *United States* v. *Waldman*, 240 F. 2d 449, 451-2 (2d Cir. 1957). The rule is so well established that it is hardly necessary to repeat that the declarations of one conspirator may be used against an-

other conspirator, not present, on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule. *Lutwak* v. *United States,* 344 U. S. 604, 617 (1953).

Moreover, evidence of acts and declarations of one conspirator, binding on a confederate on an agency theory, need not be confined to the conspiracy charge. Under the rule of this circuit such evidence is also competent to prove guilt of the substantive crimes. *United States* v. *Campisi,* 248 F. 2d 102 (2d Cir.), cert. denied, 355 U. S. 892 (1957); *United States* v. *Perillo,* 164 F. 2d 645 (2d Cir. 1947); *United States* v. *Olweiss,* 138 F. 2d 798 (2d Cir. 1943), cert. denied, 321 U. S. 744 (1944).

The appellant refers particularly to that part of the evidence on the conspiracy count which concerned events occurring after February 18th—e.g., Zirilli's discussion with the defendants in April about the plan to import heroin from Italy—and argues that it was improperly admitted because it worked a prejudicial variance in attempting to prove a separate conspiracy beyond the purview of the indictment. The indictment, however, charged that a conspiracy existed from on or about January 1, 1955 and continuously thereafter up to and including August 15, 1955, the date it was filed. The purpose of the conspiracy was to receive and distribute unlawfully acquired heroin; the creation of new sources of supply and new avenues of distribution were certainly related to that purpose. Such evidence was admissible as acts and declarations in furtherance of the conspiracy. Appellant argues that this plan was not in furtherance of the conspiracy charged, because on Feb-

ruary 16th or at least on February 18th the investigative net had been closed around the defendants, marking the effective defeat of that conspiracy and nothing that occured after that date could be in furtherance of it. See *Lutwak* v. *United States, supra,* at 618. The short answer to this contention is that the conspiracy did not actually end until August 3rd when Accardi was arrested. Appellant cites no authority for the admittedly novel proposition that a conspiracy terminates when the "investigative net has been closed." He urges the court to make "new law" on this point. There is no merit to the claim and the court declines to adopt the proposal.

Accardi also claims as error the reception into evidence of incriminating statements, made after he was indicted and in the absence of his counsel, which he claims, in effect, deprived him of due process of law and of his constitutional right of counsel.

On September 22nd, weeks after the indictment, Agent Belmont went to the Bloomfield gas station to serve a subpoena on Accardi's brother-in-law. Accardi was present, recognized Belmont and asked Belmont to help him; he told Belmont that the case has been "made up against him; that he had never sold narcotics." Belmont told him that the case against him was well-documented and that he could tell his story at trial. Accardi then admitted that he had met Truglio (Zirilli's cover name) with Russo and DiGregorio, but had "chased them" when they proposed to talk about narcotics.

Agent Belmont testified on rebuttal to this conversation to contradict, through evidence of a prior inconsistent state-

ment, Accardi's own testimony that he had seen Zirilli for the first time when Zirilli testified at the trial. The only objection made by the defense to this evidence was that it was improper rebuttal. The objection now raised was not then made that the evidence was inadmissible under *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) or *Massiah* v. *United States,* 377 U.S. 201 (1964), although each of those cases had been decided prior to the trial.

In any event, the facts and circumstances of the present case are clearly distinguishable from *Escobedo* and *Massiah.* The conversation at the Bloomfield gas station was initiated entirely by Accardi as a protest of his innocence. There was no inducement offered him to make the statements, nor were they made because of any deception practiced upon him or through an attempt by Belmont to interrogate him. On the contrary, Accardi volunteered his statements to Belmont who had made the trip to Bloomfield for an entirely different reason, who encountered Accardi by chance and who did not ask Accardi a single question concerning the merits of the case.

The appellant does not claim that Accardi's statement to Belmont was other than voluntary nor does he claim that there was any interrogation or attempt at interrogation by the agent. The incident is, therefore, not within the prohibited area of post-indictment interrogation in the absence of defense counsel. *United States* v. *Guerra,* 334 F. 2d 138 (2d Cir. 1964).

The Supreme Court said in *Walder* v. *United States,* 347 U.S. 62, 65 (1954):

> "[A defendant] * * * must be free to deny all the elements of the case against him without thereby giving

> leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."

See also, *Tate* v. *United States,* 283 F. 2d 377 (D.C. Cir. 1960).

With regard to the penalties imposed by the trial court, the appellant argues that consecutive sentences of five years each on three counts is in effect double or triple punishment for a single offense, that of January 31st, 1955.

Appellant was convicted of violating several statutory controls devised by Congress for dealing with traffic in narcotics. Although the substantive offenses of which he was convicted and sentenced arose from a single transaction, the imposition of consecutive sentences was not error. *Gore* v. *United States,* 357 U.S. 387 (1958); *Blockburger* v. *United States,* 284 U.S. 299 (1931); nor was the imposition of a separate sentence for the conspiracy offense improper. See *Pereira* v. *United States,* 347 U.S. 1, 11 (1953).

There is no merit to this nor to any of the other points presented in the appeal.

The judgment below is affirmed.

APPENDIX B

Judgment Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of March one thousand nine hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAM ACCARDI,

Defendant-Appellant,

JOSEPH RUSSO, FRANK DIGREGORIO,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment Sought to be Reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Statutes Involved*

Title 18, United States Code, Section 371:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 21, United States Code, Section 173:

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

---

* All statutes are set forth as they were in effect on the dates of the alleged offenses charged in the indictment.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, Section 174:

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five

years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173, and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, United States Code, Section 4701:

§4701. *Imposition of tax.*

(a) *Rate*

There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale, at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on narcotic drugs.

(b) *By whom paid*

The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder.

Title 26, United States Code, Section 4703:

§4703. *Affixing of stamps.*

The stamps provided in section 4771 (a) (1) for narcotic drugs shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

Title 26, United States Code, Section 4704(a):

§4704. *Packages*

(a) *General Requirement*

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, United States Code, Section 4771(a)(1):

§4771. *Stamps.*

(a) Method of payment.

(1) Stamps.

The taxes imposed by sections 4701 and 4741 shall be represented by appropriate stamps, to be provided by the Secretary or his delegate.

Title 26, United States Code, Section 7237:

§7237. Violation of laws relating to narcotic drugs and to marihuana.

(a) Violation of law relating to opium and coca leaves and marihuana.

Whoever commits an offense or conspires to commit an offense described in subpart C of Part I, or Part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and for a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. . . .

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:	
Blockburger v. *United States*, 284 U.S. 299	11
Callanan v. *United States*, 364 U.S. 587	11
Escobedo v. *Illinois*, 378 U.S. 478	9
Gore v. *United States*, 357 U.S. 386	11
Holland v. *United States*, 348 U.S. 121	10
Lutwak v. *United States*, 344 U.S. 604	10
Massiah v. *United States*, 377 U.S. 201	8, 9
Pereira v. *United States*, 347 U.S. 1	11
Pinkerton v. *United States*, 328 U.S. 640	11
St. Clair v. *United States*, 154 U.S. 134	11
United States v. *Annunziato*, 294 F. 2d 373, certiorari denied, 368 U.S. 919	10, 11
United States v. *Guerra*, 334 F. 2d 138, certiorari denied, 379 U.S. 936	9
United States v. *Pugliese*, 153 F. 2d 497	11
Walder v. *United States*, 347 U.S. 62	9
Statutes:	
18 U.S.C. 371	2
21 U.S.C. 174	2
26 U.S.C. 4704(a)	2
Miscellaneous:	
F.R. Crim. P., Rule 30	11

776-185—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1134

SAM ACCARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–10) is reported at 342 F. 2d 697.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1965. On April 8, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 7, 1965. The petition was filed on May 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a narcotics agent was properly permitted to testify regarding remarks made by petitioner in a post-indictment conversation which petitioner initiated when he met the agent.

2. Whether certain trial court rulings on admission of evidence were proper.

3. Whether the instructions to the jury on reasonable doubt and the declarations of a joint venturer were proper.

4. Whether the court could impose consecutive sentences on counts charging conspiracy and different substantive narcotics offenses.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted under four counts of a five-count indictment.[1] Count one charged a transportation of heroin on January 31, 1955, in violation of 21 U.S.C. 174. Count two charged a sale of heroin not in the original stamped package on the same date, in violation of 26 U.S.C. 4704(a). Count three charged a transportation of heroin on February 18, 1955, in violation of 21 U.S.C. 174. Count five charged a conspiracy to commit narcotics offenses from January 1, 1955, to August 15, 1955, in violation of 18 U.S.C. 371 (P.A. 1, 8–13; 78–79).[2] Two co-

[1] Count four was dismissed before trial on motion of the government (Tr. 2–3).

[2] "P.A." refers to petitioner's appendix in the court below, "G.A." to the government's appendix, and "Tr." to the transcript of the trial.

defendants, Frank DiGregorio and Joseph Russo, pleaded guilty to counts one, three, and five before petitioner's trial (P.A. 2–3). Petitioner's total sentence was fifteen years' imprisonment and a fine of $16,000 (P.A. 78–79). The court of appeals affirmed the conviction (Pet. App. 1–10). The evidence may be summarized as follows:

1. *Sale of January 31, 1955.*—In January 1955, Anthony Zirilli, a narcotics agent working undercover, told codefendant Frank DiGregorio that he wished to buy pure heroin in large quantities (1 to 1½ kilos each month). On the afternoon of January 31, DiGregorio introduced Agent Zirilli and a special employee to codefendant Joseph Russo. Because Russo said that he was not the top man, Zirilli expressed hesitation in dealing with him. Finally, Zirilli agreed to try one-half kilo and arranged to meet Russo later the same evening in a Manhattan restaurant. About 7 p.m. Russo arrived at the restaurant, received $5,000 from Agent Zirilli, and left to obtain the heroin (G.A. 2–8). Outside the restaurant, Russo entered DiGregorio's car, and the two of them—followed by narcotics agents—drove to Bloomfield, New Jersey, and parked around the corner from petitioner's home (Tr. 187–193, 198, 340–343).[3] About 9 p.m., Russo and DiGregorio appeared outside the restaurant and delivered to Agent Zirilli one-half kilo of heroin (G.A. 8–10).

---

[3] The agents drove past Russo and DiGregorio when they parked. After turning around and returning, the agents found that the car had vanished (Tr. 187–193).

In early February, after complaining of having been cheated because the heroin had not been pure, Agent Zirilli asked to meet Russo's supplier. Russo said, "Come on, I'll call my man," and placed a call to petitioner's telephone number in Bloomfield, New Jersey (G.A. 11–13, Tr. 417). Russo reported that "his man" had claimed that the heroin had been pure, but that Zirilli could return it for a refund of his money. Agent Zirilli answered that he had already sold the heroin (G.A. 13).

A few days later, on February 12, DiGregorio told Agent Zirilli that he had spoken to "Sam", who had insisted that the heroin had been pure and wanted to continue doing business with Zirilli. Again Agent Zirilli asked to meet "Sam". DiGregorio and Russo placed a telephone call and fixed a time and place the next day for Zirilli to meet "Sam", but "Sam" never appeared (G.A. 14–18).

There was further discussion about meeting "Sam", and then on February 16, Agent Zirilli, DiGregorio, Russo, and the special employee drove to Bloomfield, New Jersey, and met petitioner in the office of an Esso Service Station (G.A. 18–21). In answer to Agent Zirilli's complaints about the January 31 purchase, petitioner said (G.A. 21):

> Why the first buy was pure. * * * I tested it myself. It broke 230. It was 95 percent pure.

Thereafter, Zirilli demanded to know who would be responsible the next time. Petitioner replied, "Don't worry about it. Everything will go all right, everything will go out all right." Petitioner told Zirilli

to continue doing business with Russo and DiGregorio and, if he were dissatisfied with the heroin, to return it to Russo and receive his money back. Narcotics agents had petitioner under surveillance and saw him enter the office and speak with Zirilli and the others (G.A. 19–23).

2. *Sale of February 18, 1955.*—Two days later at about 3 p.m., Agent Zirilli met DiGregorio at a restaurant and paid $9,600 for a kilo of heroin. About 4:45 p.m., Russo telephoned Zirilli at the restaurant that he and "Sam" were caught in heavy traffic and that DiGregorio would be late. About 5 p.m., DiGregorio delivered to Agent Zirilli a brown-paper package containing the promised kilo of heroin (G.A. 24–28). While Zirilli was in the restaurant, other narcotics agents were following petitioner, who left his home in New Jersey about 2 p.m., drove to New York City, and placed a telephone call from a drug store. A few minutes later, the agents lost petitioner in the city traffic, but they saw him again about 4 p.m., this time driving with Russo in the car. Petitioner stopped his car, picked up DiGregorio, drove 150 feet, stopped again to let DiGregorio out, and then drove away. On leaving petitioner's car, DiGregorio made a "hitching" motion, as if he were carrying a package underneath his arm inside his overcoat. DiGregorio then drove directly to the restaurant where Zirilli was waiting. When he stepped out of the car, he was carrying a brown-paper package (Tr. 208–213, 242–249).

3. *Trip to Italy.*—On April 28, Agent Zirilli, DiGregorio, and the special employee met petitioner at

the same Esso Station to discuss plans for Zirilli to travel to Italy to bring back a $40,000 shipment of heroin. After agreeing with Zirilli on the details, petitioner said that he would write to Italy to make the final arrangements (G.A. 34–37). Narcotics agents surveilling petitioner saw him engage in this conversation with Agent Zirilli, DiGregorio, and the special employee (Tr. 309–311). About a week later, DiGregorio informed Zirilli that the trip had not been approved by the people in Italy (G.A. 38–39).

4. *Petitioner's trial testimony.*—The government's case against petitioner consisted principally of the testimony of Agent Zirilli and of other narcotics agents who had kept petitioner, Russo, and DiGregorio under surveillance. Zirilli's testimony about his two meetings with petitioner on February 16 and April 28 was corroborated by narcotics agents who actually observed petitioner talking to Zirilli, DiGregorio, Russo,[4] and the special employee on those dates (Tr. 303–307, 309–311). Testifying in his own defense, petitioner denied on direct examination that he had seen Russo on February 16 or DiGregorio on that date and April 28. He further testified that he had never seen Agent Zirilli before the trial (Tr. 447, 451–452, 455–456). During his cross-examination, petitioner said that he did not know a person named Cristoforo Rubino, that never before had he seen Daniel Belmont (a narcotics agent who had testified earlier for the government), and that he had never told Agent Belmont that he had met with Russo, DiGregorio, and Agent Zirilli (G.A. 44; Tr. 577–581).

[4] Russo was not present at the meeting of April 28.

The government then recalled Agent Belmont, who testified that on September 22, 1955—about a month after petitioner had retained counsel and pleaded not guilty to the indictment (P.A. 1–2)—he went to the Esso Station in Bloomfield, New Jersey, to serve a subpoena on petitioner's son-in-law. Petitioner was there and asked Agent Belmont, "What are you doing here" (G.A. 40–42). The following occurred (G.A. 42–43):

> Q. What did he say Agent Belmont? A. "Help me. Help me."
>
> And I said, "How can I help you?"
>
> He said, "I need a lawyer."
>
> I said, "Well, you have a lawyer." Mr. Callander was, to my knowledge, his lawyer.
>
> And he went on to tell me that he didn't do this and that the case was all made up against him; that he never sold narcotics.
>
> And I told him that I was aware of all of the details of the case; all of the conversations that he had in this gas station with Frank DiGregorio and Joe Russo were documented and complete memoranda were made up; copies went to Washington; that all of this case was documented; that there would be a trial and at the trial if he felt he was innocent he would be heard before a jury and he would have a fair trial.
>
> He protested that he did see these two men on two occasions at the gas station, Frank DiGregorio and Joe Russo, and this agent De Matteo, who called himself Truglio,[3] he knew then that he didn't talk narcotics; when they talked narcotics he chased them—his words, he

[3] "Truglio" was Agent Zirilli's undercover name (G.A. 44).

> chased them away; that this agent, De Matteo, who calls himself Truglio, talked with him about $45,000 and a trip to Italy to get stuff.
>
> The conversation went on. He said he did chase them away when he found out that it was for narcotics. He would have nothing to do with it.

Agent Belmont further testified that the following occurred (G.A. 44):

> Q. Was there any further conversation? A. We talked about other people that were—I don't know how to put this now; whether he knew certain people that were in the same investigation—let's put it that way—and I mentioned to him several names of different people, one of whom was Christoforo Rubino. He said he knew him from Brooklyn but denied that he had talked to him on the phone or had any transactions with him.

Except for preliminary objections that Belmont's testimony was improper rebuttal (G.A. 40–41), it was received without objection.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 11–13) that the rule of *Massiah* v. *United States*, 377 U.S. 201, barred Agent Belmont from testifying about a post-indictment conversation in which petitioner had made statements inconsistent with his testimony at the trial. The *Massiah* rule does not apply to every post-indictment utterance by an accused, but only to statements "deliberately elicited" by the government. 377 U.S. at 206. Belmont's purpose in going to the Esso Station was to serve a subpoena on petitioner's

son-in-law; coincidentally, petitioner happened to be there when the agent arrived (Tr. 443–445, 454–455). Petitioner then initiated the conversation, and asserted his innocence. Belmont did not deliberately elicit incriminating statements; at most, he was a passive listener. Moreover, there was no deception in the present case. Petitioner knew and recognized Belmont as a government agent and voluntarily spoke to him in the absence of his attorney. Finally, as the court of appeals held (Pet. App. 9–10), even if Agent Belmont had acted illegally, the government could use the evidence to impeach petitioner's testimony on direct examination that he had never met with Zirilli and the others. *United States* v. *Guerra*, 334 F. 2d 138, 143 (C.A. 2), certiorari denied, 379 U.S. 936; see *Walder* v. *United States*, 347 U.S. 62.

Nor was petitioner prejudiced by the testimony that he had admitted knowing Christoforo Rubino. Rubino was never mentioned at any other time during the trial, so that the evidence of petitioner's admission that he knew him was inconsequential and did not constitute reversible error, particularly in the absence of objection.[6] *United States* v. *Guerra*, 334 F. 2d 138, 144 (C.A. 2), certiorari denied, 379 U.S. 936.

2. Contrary to petitioner's contentions (Pet. 14, 15–17), the trial court properly received evidence concerning petitioner's acts in furtherance of the conspiracy between the last sale to Agent Zirilli on

[6] The trial in the instant case, at which petitioner did not object to proof of his post-indictment statements, occurred in July 1965—after this Court's decisions in *Massiah* v. *United States*, *supra*, and *Escobedo* v. *Illinois*, 378 U.S. 478.

February 18, 1955, and petitioner's arrest on August 3, 1955. Count five of the indictment charged petitioner and his codefendants, Russo and DiGregorio, with conspiring to transport and sell narcotics between January 1, 1955, and August 15, 1955. The testimony about petitioner's acts after the last sale of heroin to Agent Zirilli was plainly in furtherance of that conspiracy, for the testimony dealt with petitioner's efforts in April to send Zirilli to Europe to obtain more heroin for distribution in this country. All acts and declarations in furtherance of the conspiracy were admissible at the trial. *E.g., Lutwak* v. *United States,* 344 U.S. 604, 615. The conspiracy continued through August 3 (when petitioner was arrested), and petitioner admits that his theory that it ended on February 18 is not supported by any authority (Pet. 15).[7]

3. Petitioner's objections to the jury instruction are groundless (Pet. 18–23, 24–31). The instructions on reasonable doubt (P.A. 27–28) were suggested by this Court in *Holland* v. *United States,* 348 U.S. 121, 140. Petitioner made no objection to the government's request for instructions (G.A. 46–47) setting forth the well settled principle that statements made by a partner in a joint venture, and in furtherance of it, are admissible against all partners to the venture. *E.g., United States* v. *Annunziato,* 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United*

[7] In addition, we disagree with petitioner's assumption (Pet. 15) that the "investigative net" closed on February 18 when Zirilli made his last purchase of narcotics. The government was still investigating in April when Agent Zirilli negotiated with petitioner about the trip to Europe.

States v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); cf. *St. Clair* v. *United States*, 154 U.S. 134, 139.[8]

4. It is well settled that the sentencing court could impose consecutive sentences for the conspiracy count and for each of the separate substantive narcotics counts charged in the indictment. *Callanan* v. *United States*, 364 U.S. 587; *Gore* v. *United States*, 357 U.S. 386; *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640; *Blockburger* v. *United States*, 284 U.S. 299.

---

[8] We call to the Court's attention that although the trial court granted the government's request, petitioner is mistaken in his assumption that the trial court actually gave the instruction. The court instructed the jury that if petitioner's own statements and conduct showed that he participated in the conspiracy, the declarations and acts of his co-conspirators were binding on him as to the conspiracy count, but the court was silent about whether the co-conspirators' declarations and acts bound him on the substantive counts (P.A. 51). Petitioner does not contend that these instructions prejudiced him, and since he did not object to the instructions (G.A. 46–47; P.A. 71–72), F.R. Crim. P., Rule 30, precludes him from making any such contention on appeal. In any event, even if the jury did interpret the instructions to mean that the declarations and acts of the co-conspirators also bound petitioner on the substantive counts, no harm resulted. Since the government proved petitioner guilty on the conspiracy counts, and since the substantive counts were in furtherance of the conspiracy, petitioner was in fact bound by the statements of his co-conspirators on the substantive counts as well. *Pinkerton* v. *United States*, 328 U.S. 640, 645; *United States* v. *Annunziato*, 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE WIESEMAN,
Attorneys.

JUNE 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965